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No. 89-1875

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

CITY OF SANTA ANA, et al.,
Petitioners,

vs.

DALE CONNER and LINDA CONNER,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE COUNTY OF LOS ANGELES IN SUPPORT OF PETITIONERS, CITY OF SANTA ANA, ET AL.

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Summary of Reasons to Grant Petition:

1. The right of local communities to abate public nuisances on private property, after notice, hearing, finding, and order of correction or abatement, without any judicial branch involvement, including a warrant requirement, is old and established.

2. The warrant requirement in the 4th Amendment has never been applied to entry to abate a known public nuisance after notice, hearing, finding, and order.

3. Local government programs to cite public nuisances on the complaints of neighbors, and abate after hearing, protect neighborhoods from creeping blight and "keep the

peace" between neighbors by providing a practical, inexpensive remedy for this problem.

4. A warrant requirement will delay the correction of public nuisances, increase neighborhood blight, and threaten the peace of neighborhoods suffering from a selfish property owner.

5. Since the selfish property owner has already had notice, a hearing, a finding of nuisance, and an order of correction or abatement which he could take to the judicial branch by administrative mandate or petition for injunction, he has no legitimate interest which the warrant is necessary to protect.

6. Since there has never been such a

requirement, it is cruel to deny qualified immunity to public employees for entry of private property to abate after hearings, etc., without warrants of a type which did not exist statutorily, then or now.

Questions Presented:

Should a warrant requirement now be imposed on local government to enter private property to abate public nuisance, after notice, hearing, finding of public nuisance, and a reasonable time for the property owner to correct the public nuisance or seek judicial relief?

Should local public officials who entered private property to abate a public nuisance, after notice, hearing, etc., prior to the decision in this case, not have qualified immunity since the warrant requirement after notice, hearing, etc., did not exist before this decision?

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I

INTEREST OF AMICUS

Pursuant to Supreme Court Rules, Rule 37.5, the County Counsel of Los Angeles County, State of California,

submits this brief in support of Petitioners, the City of Santa Ana, et al., only as to the issues of warrants for abatement after notice and hearing and qualified immunity as described on Page iv, supra.

County strongly agrees with the dissenting opinion of Judge Trott in this case.

Nothing in this brief is intended to refer in any way to an emergency situation, in which public building officials may abate a public nuisance which is an immediate and serious threat to public health and safety by demolition or otherwise without notice and a hearing.

1. The Warrant Requirement

A nuisance is a condition of property which is injurious to health, which is offensive to the senses, or which interferes with the use or enjoyment of neighbors' property. (Calif. Civil Code, §3479 (enacted 1872, based on Field Codes).)

Nuisance is well-defined by modern case law and the common law.

A public nuisance is one which affects at the same time an entire community or neighborhood or considerable number of persons. (Calif. Civil Code, §3480.)

Under California law (and generally) local governments such as

counties may abate public nuisances, after notice and hearing, with no judicial branch involvement. (Calif. Civil Code, §3491(3); Calif. Govt. Code, §25845; 58 Am Jur. 2d, Nuisances, §411, p. 989 (1989).)

Heretofore this Court has not required a warrant under the Fourth Amendment when local officials enter to abate after notice, hearing, finding of nuisance, and order.

Los Angeles County regularly abates public nuisances after notice and hearing in its unincorporated areas and, by contract, for 20 cities within the County.

This County program attacks neighborhood deterioration from unsightly,

unsafe, and unhealthful property conditions.

Typical abatements (after notice and hearing) include: barricading or demolition of abandoned, dangerous structures; clearance of debris, inoperable vehicles, and overgrown vegetation from land.

In 1989, this program in County resulted in: 462 houses being restored for occupancy; 1,114 properties being cleared of trash, debris, excessive weeds and brush, and inoperable machinery and vehicles; and 117 deteriorated structure being demolished in areas of extensive blight.

This program also "keeps the peace" in neighborhoods by providing

small property owners with an inexpensive, practical (i.e., non-judicial) remedy against the selfish neighbor, who for whatever reason, keeps his property in a seriously blighted and/or dangerous condition.

70% of County's rehabilitation enforcement actions arise from neighbor complaints. (See e.g., Petitioners' Brief, Appendix B, Page 3b, Court Findings 15 and 16.)

The County's procedures, by ordinance, require:

1. That an inspector investigate the neighbor's complaint of a public nuisance by express permission or by obtaining a judicial inspection warrant if permission to enter cannot be obtained. (See Calif. Code Civ.

Proc., §1822.50.)

2. That if the inspector finds a public nuisance, a written notice of the finding be given to the owner.

3. That a hearing be held before the Rehabilitation Appeals Board (a politically-appointed body of persons knowledgeable in real estate and property management matters) and the owner be allowed to present his case in opposition to the inspector.

4. That, if the Board finds a public nuisance, a written finding and order, giving the owner a reasonable time and a reasonable manner to abate the nuisance or the entity will abate it, be sent to the owner. (Typical order: 90 days to remove

excessive weeds or trash or it will be removed by County.)

5. If the corrective work is not done and an extension of time is not requested and granted by the Board, the work will be done by County forces.

In the past, although an inspection warrant was necessary if permission to enter was not obtainable, no warrant for abatement of a known public nuisance has ever been requested by County from the judicial branch or demanded by a property owner. (Although there is an inspection warrant, no abatement warrant seems to exist in California or elsewhere. See below.)

If this Court imposes a warrant

requirement, it will increase neighborhood blight, especially in older, poorer neighborhoods, and increase breaches of the peace involving selfish neighbors by substantially impeding the abatement of known public nuisances by local government.

Since there is no such warrant in California, such a ruling would destroy this socially beneficial County program.

2. Qualifed Immunity

Since there has never been a requirement for a warrant to enter land to abate a known public nuisance after notice, hearing, etc., and since there was no such warrant in California at the pertinent time (see

below), it was unfair and callous of the majority to remove qualified immunity from the public officials, employees, and agents who entered to abate the public nuisance after notice, adversary hearings, findings and rulings of public nuisance, and more than ample time for the property owner to correct the situation.

As to the entry to inspect, an inspection warrant existed in California and would have been obtained under County procedures. But, City's ordinance did not so require, so they should be immune.

And by stripping qualified immunity from these innocent officers who entered without a warrant to abate after hearings, etc., when there was

not even a warrant available for that kind of entry, the Ninth Circuit has done a serious injustice to these innocent public employees.

ARGUMENT

1. Municipalities' Police Power to Abate Public Nuisances After Notice and Hearing, Without Judicial Process, Is Well Established.

It is well settled that the police power of municipalities in this country includes the power to abate public nuisances, after notice and hearing (if not an emergency), with no judicial process. (City of Rapid City v. Boland (Supreme Court

of South Dakota, 1978) 271 N.W. 2d 60, 67; Thain v. City of Palo Alto (1962) 207 Cal. App. 2d 173, 187-91, 24 Cal. Rptr. 515, 523-26; 58 Am. Jur. 2d, Nuisances, §411, p. 989 (1989); 6A McQuillin, Municipal Corporations, §§24.71 and 24.72, pp. 208-212; Restatement, Second, Torts §202, pp. 375-78 (A.L.I., 1965); Restatement, (First) Torts §202, (A.L.I., 1934-39).)

This Court itself has agreed, stating about the local police power, "It is universally conceded . . . to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance." (Lawton v. Steele (1894) 152 U.S. 133, 136, 38 L.Ed. 385, 388,

14 S.Ct. 499, 500.)

2. Judicial Warrants Have Never Been Required for Entry to Abate After Notice and Hearing (If Non-Emergency)

In no reported federal or state case has this power been limited by the requirement of a judicial warrant to enter to abate, after notice and hearing and finding of public nuisance, except the case at bar.

Those cases relied on by the majority which pertained at all to local power to abate public nuisances were only about the necessity of a

warrant for inspection, not for abatement after hearing.

In Gleaves v. Waters (1985), 175 Cal. App. 3d 413, 220 Cal. Rptr. 621, the California Court of Appeal ruled that when permission to enter is refused to both inspect and abate, if necessary (by leaving posion for Japanese beetles), during the same entry, a warrant is required for that entry.

County agrees with this limited ruling on the actual facts but not with possible dicta therein. If entry is refused to inspect or inspect and abate at the same time (in a non-emergency situation), a warrant should be obtained because the inspector is clearly searching

for possible public nuisance, under the Fourth Amendment.

However, in the case at bar as in the typical case, the entry for abatement occurred after notice and lengthy hearings, after a finding of public nuisance by an authorized representative of the lcoal governmental entity, and after time for the owner to either correct the nuisance or take the matter to court by injunction or administrative mandate or petition for declaratory relief.

And therefore, no warrant should be required for the entry to abate.

If warrants for entry for abatement after notice and hearing were legally required, they would surely exist in federal and state statutes

and in the form books since local government non-judicial abatement of public nuisances is an ancient right, oft-used from common law to the present

There is no such warrant in California. As the Gleaves court noted, "Indeed, we are unaware of any statutory procedure for issuance of a warrant authorizing entry into private property specifically to abate a public nuisance." (Gleaves v. Waters, supra, 175 Cal. App. 3d at 420, 220 Cal Rptr. at 625.)

A review of the popular form books, federal and state, reveals no form for a warrant specifically to enter to abate a public nuisance.

The two pertinent model building

codes are consistent. Both require a judicial warrant to enter to inspect for public nuisance if entry is refused but neither requires a warrant to enter to abate a nuisance found after notice and hearing. (See Uniform Housing Code, §201(b) (International Conference of Building Officials, 1985 Edition); see Uniform Code for the Abatement of Dangerous Buildings, §201(c) (International Conference of Building Officials, 1985 Edition).)

Local governments have used this power frequently for, say, 250 years; and yet there are no forms for such warrants. This persuades that there has never been a warrant requirement before this case.

3. A Warrant Would Add Nothing to Owner's Protection.

The Fourth Amendment requires that a warrant be based on probable cause and that the place to be entered and the objects to be sought be particularly described.

In the case at bar, and in all local abatement proceedings, because of the due process requirements of adequate notice, fair hearing, and specific order, the property on which the nuisance is located (lot number, street address) and the nuisance itself (dilapidated structure, excessive weeds, old cars, etc.) and the steps to be taken by owner or

entity to correct or abate it in a specific time (repair, barricade, remove, fence, demolish, etc.) are perfectly clear.

It is not probable but certain that the nuisance has been declared and it is certain that the nuisance exists on the property and of what it consists.

The only dispute is usually whether the situation constitutes a public nuisance or whether the abatement method ordered is too drastic or the time allowed for correction is too short.

But a judge only issuing a warrant would not have authority to get to the merits of these disputes.

After a hearing, a warrant

requirement only adds paperwork and delay. After the hearing, there is nothing for the warrant-issuing judge to decide which is really in dispute.

4. Since No Warrant Was Required for Abatement Entry, Officers Should Have Qualified Immunity.

It is very clear (supra) that the law clearly did not require a warrant for the entry to abate.

The First and Second Restatement of Torts describe such an entry of private property by a public official as "privileged." (Supra, as to Second Restatement; First Restatement

was issued in 1934-39 and is now hard to find, but see Vol.1 Restatement of the Law of Torts, California Annotations, §202 (A.L.I., 1940).)

It is grossly unfair to remove qualified immunity from the officers who entered to abate after the extensive hearings and ample time for the owners to correct the problem.

CONCLUSION

It is clear that the Ninth Circuit wants more than a mere warrant requirement. The majority clearly want to require judicial action to abate all public nuisances. (See Conner v. Santa Ana (9th Cir. 1990) 897 F.2d 1487, 1492 at note 7.)

This will unnecessarily remove a traditional police power from local government and will increase the load of the courts.

The result will be increased neighborhood blight and increased breaches of the peace involving selfish neighbors.

This Court should follow Justice Trott's dissenting opinion and not require a warrant after notice and hearing and should restore qualified

immunity to the officers who entered to abate.

Wherefore this Petition should be granted and the dissenting opinion of Judge Trott should be adopted by this Court.

Dated June 28, 1990

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5/BRIEF-1/am
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